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Chin Kek Shen v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–83/03 OF 2012

APANDI ALI, LINTON ALBERT AND HAMID SULTAN JJCA

5 APRIL 2013

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Criminal Procedure — Trial — Duty of court — Consideration of defence — Refusal to allow witness to be recalled — Whether there were good reasons for disallowing application to recall witness — Mistrial — Whether consideration of earlier plea of guilt to reduced charge amounted to mistrial — Whether conviction unsafe — Whether appellate intervention necessary — Criminal Procedure Code s 425

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Evidence — Witness — Failure to call witness — Adverse inference — Whether proper for trial judge to invoke adverse inference against appellant on facts of present case — Evidence Act 1950 s 114(g)

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The appellant was arrested along a five foot way holding a plastic bag which contained 646.1g of drugs. When he was arrested the appellant attempted to flee and put up a struggle. The appellant was charged for trafficking in the drugs, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). However, at the close of the prosecution case the charge was reduced to one of possession. The appellant pleaded guilty to the charge of possession, which was punishable under s 39A(2) of the DDA, and was sentenced to nine years imprisonment and ten strokes of the rotan. The prosecution appealed to the Court of Appeal, which ordered the defence to be called on the original charge of trafficking. The case was remitted to the High Court and heard by the trial judge who had convicted him of possession. In his defence the appellant claimed that he was arrested when he was walking to meet one Simon, who owed him a gaming debt, and that at the time of his arrest he was not holding the bag containing the drugs. Instead, the appellant claimed that the bag containing the drugs was recovered from the boot of his girlfriend's ('Nicole's') car. The appellant applied to recall the prosecution's main witness, the arresting officer ('SP1'), to establish his defence. However, this application was refused by the trial judge, who went on to rule that the appellant's defence was an afterthought and to comment that the appellant's failure to call Nicole could attract adverse inference. The trial judge went on to find that the offence of trafficking had been proven and accordingly sentenced the appellant to death. This was the appellant's appeal against that conviction and sentence. The appellant argued that the trial judge had erred, inter alia, in refusing his

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application to recall SP1; in not giving proper consideration to the defence case and in the wrong application of adverse inference.

Held, allowing the appeal:

(1) On the factual matrix of this case it was plainly wrong for the trial judge to arbitrarily disallow the appellant's application to recall SP1 without good reasons. It is well settled that a court has a wide discretion to allow a witness to be called or recalled under s 425 of the Criminal Procedure Code ('CPC') before the close of the defence case. Although the power under s 425 of the CPC is discretionary, it ought to be exercised judiciously, failing which appellate interference was warranted. In the instant case, the refusal of the trial judge to allow the witness to be recalled and subsequently making adverse findings and remarks in respect of the defence case, compromised the integrity of the decision making process and attracted the jurisprudence relating to mistrial as well as miscarriage of justice, which required appellate intervention to rule that the conviction was unsafe (see paras 8–9).

(2) It was not proper for the trial judge to invoke adverse inference pursuant to s 114(g) of the Evidence Act 1950 ('Act'), on the factual matrix of this case. It is settled law that s 114(g) of the Act could not be invoked against an accused person. Neither could the failure of the accused to call any witness be made the subject of comment at a criminal trial except in limited circumstances and that too with caution. Further, before invoking s 114(g) the court should be satisfied that the evidence was in existence and could be produced. In the instant case, the witness Nicole was also a potential witness to the prosecution at least for the purpose of satisfying the maximum evaluation test. In such circumstances, it was plainly wrong and perverse for the trial judge to rely on s 114(g) of the Act (see paras 10 & 18).

(3) It was plainly wrong for the trial judge to have considered the earlier plea of guilt by the appellant to a reduced charge at the prosecution stage. Such a consideration had caused a mistrial and/or miscarriage of justice as it clouded the court from acting fairly and reasonably without bias whatsoever in assessing the defence version. The requirement of impartiality is a principle of natural justice and a patent breach as in the instant case would compromise any decision making process. Based on all these considerations, it was unsafe to convict the appellant and he was accordingly acquitted and discharged (see paras 20–21).

[Bahasa Malaysia summary

Perayu ditangkap di kaki lima memegang beg plastik yang mengandungi 646.1g dadah. Semasa ditangkap perayu cuba untuk melarikan diri dengan bergelut. Perayu didakwa mengedar dadah, kesalahan di bawah s 39B(1)(a)

A Akta Dadah Berbahaya 1952 ('ADB'). Walau bagaimanapun, di akhir kes pendakwaan tuduhan tersebut dikurangkan kepada satu milikan. Perayu mengaku bersalah kepada tuduhan milikan, yang boleh dihukum di bawah s 39A(2) ADB, dan dihukum kepada sembilan bulan penjara dan sepuluh sebatan rotan. Pihak pendakwaan merayu kepada Mahkamah Rayuan, yang
B mana memerintahkan pembelaan dipanggil atas tuduhan asal mengedar. Kes telah diremit ke Mahkamah Tinggi dan didengar oleh hakim perbicaraan yang menyabitkannya dengan milikan. Dalam pembelaannya perayu mendakwa yang dia ditangkap apabila dia sedang berjalan untuk berjumpa dengan seorang bernama Simon, yang berhutang judi dengannya, dan bahawa pada
C masa penangkapannya dia tidak memegang beg yang mengandungi dadah tersebut. Sebaliknya, perayu mendakwa bahawa beg yang mengandungi dadah diperolehi daripada but kereta teman wanitanya ('Nicole'). Perayu memohon untuk memanggil balik saksi utama pihak pendakwaan, pegawai yang menangkap ('SP1'), untuk membuktikan pembelaannya. Walau
D bagaimanapun permohonan ini ditolak oleh hakim perbicaraan, yang meneruskan dengan memerintahkan bahawa pembelaan perayu adalah sesuatu yang difikirkan kemudian dan memberi ulasan bahawa kegagalan perayu memanggil Nicole boleh membangkitkan inferens bertentangan. Hakim perbicaraan mendapati bahawa kesalahan mengedar telah dibuktikan dan
E dengan itu menghukum perayu kepada hukuman mati. Ini adalah rayuan perayu terhadap sabitan dan hukuman. Perayu berhujah bahawa hakim perbicaraan telah tersilap, antara lain, dalam menolak permohonannya untuk memanggil balik SP1; dalam tidak memberi pertimbangan betul kepada kes pembelaan dan pemakaian salah inferens bertentangan.

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Diputuskan, membenarkan rayuan:

(1) Atas fakta matriks kes ini adalah jelas salah bagi hakim perbicaraan untuk secara sewenang-wenangnya tidak membenarkan permohonan perayu
G untuk memanggil balik SP1 tanpa alasan yang munasabah. Adalah nyata bahawa mahkamah mempunyai budi bicara luas untuk membenarkan saksi dipanggil atau dipanggil balik di bawah s 425 Kanun Tatacara Jenayah ('KTJ') sebelum penutupan kes pembelaan. Walaupun kuasa di bawah s 425 KTJ adalah mengikut budi bicara, ia patut dilaksanakan
H secara kehakiman, kegagalan mewajarkan campur tangan mahkamah rayuan. Dalam kes ini, penolakan hakim perbicaraan untuk membenarkan saksi dipanggil semula dan kemudiannya membuat dapatan bertentangan dan teguran berkaitan kes pembelaan, mengkompromi integriti proses membuat keputusan dan
I membangkitkan jurisprudens berkaitan kepada perbicaraan silap dan juga ketidakadilan, yang memerlukan campur tangan Mahkamah Rayuan untuk memerintahkan bahawa sabitan tersebut adalah tidak selamat (lihat perenggan 8–9).

(2) Adalah tidak wajar untuk hakim perbicaraan membangkitkan inferens

bertentangan berikutan s 114(g) Akta Keterangan 1950 ('Akta'), atas fakta matriks kes ini. Adalah undang-undang nyata bahawa s 114(g) Akta tidak boleh dibangkitkan terhadap tertuduh. Juga kegagalan tertuduh untuk memanggil mana-mana saksi dijadikan subjek komen di perbicaraan jenayah kecuali dalam keadaan terhad dan ia juga mesti dengan berhati-hati. Selanjutnya, sebelum membangkitkan s 114(g) mahkamah patut berpuas hati bahawa keterangan adalah wujud dan boleh dikemukakan. Dalam kes ini, saksi Nicole juga adalah saksi berpotensi kepada pihak pendakwaan sekurang-kurangnya bagi tujuan memenuhi ujian penilaian maksima. Dalam keadaan sedemikian, adalah jelas salah dan bertentangan untuk hakim perbicaraan bergantung ke atas s 114(g) Akta (lihat perenggan 10 & 18).

(3) Adalah jelas salah untuk hakim perbicaraan mempertimbangkan pengakuan bersalah sebelumnya oleh perayu untuk mengurangkan tuduhan di peringkat pihak pendakwaan. Pertimbangan sedemikian telah menyebabkan perbicaraan silap dan/atau ketidakadilan kerana ia mengkaburi mahkamah daripada bertindak dengan adil dan munasabah tanpa apa-apa berat sebelah dalam menilai versi pembelaan. Keperluan keadilan adalah prinsip keadilan semula jadi dan kemungkiran jelas seperti dalam kes ini akan meng kompomi apa-apa proses membuat keputusan. Berdasarkan kesemua pertimbangan ini, adalah tidak selamat untuk menyabit perayu dan perayu oleh itu dilepaskan dan dibebaskan (lihat perenggan 20–21).]

Notes

For cases on duty of court, see 5(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 5351–5357.

For cases on failure to call witness, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3259–3277.

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Choo Chang Teik & Anor v PP [1991] 3 MLJ 423, SC (refd)

Goh Ah Yew v PP [1949] 1 MLJ 150 (refd)

Goi Ching Ang v PP [1999] 1 MLJ 507, FC (refd)

Illian & Anor v PP [1988] 1 MLJ 421, SC (refd)

Jammu & Kashmir Bank Ltd v Attar-ul-Nissa & Others AIR 1967 SC 540, SC (refd)

Loke Poh Siang v Public Prosecutor [1957] 1 MLJ 107 (refd)

Mahabir Singh v Rohini (1933) 35 BOMLR 500, HC (refd)

Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (folld)

PP v Abdul Rahim bin Abdul Sattar [1990] 3 MLJ 188, HC (refd)

PP v Mohd Aszzid Abdullah [2008] 1 MLJ 281, HC (refd)

A *PP v Phon Nam* [1988] 3 MLJ 415, SC (refd)
Shahabuddin and another v State of Assam Cr A No 629 of 2010, (unreported), SC (refd)
Ramli bin Kechik v PP [1986] 2 MLJ 33, SC (refd)
Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1, FC (refd)
B *Tay Kok Wah v PP* [2012] 4 MLJ 502, CA (refd)
Thenegaran a/l Murugan & Anor v PP [2013] 2 MLJ 855, CA (refd)
Tong Kam Yew & Anor v PP [2013] 4 MLJ 888, CA (refd)
Woolmington v Director of Public Prosecutions [1935] AC 462, HL (refd)
C *Yap Fook Yew and another v Public Prosecutor* [1949] supp MLJ 3 (refd)

Legislation referred to
Criminal Procedure Code s 425
Dangerous Drugs Act 1952 ss 39A(2), 39B(1)(a)
D Evidence Act 1950 ss 114(g), 138(4)
Federal Constitution art 5(1)

Appeal from: Suit No B-05–83/03 of 2012 (High Court, Shah Alam)

E *Teh Poh Teik (Shukri bin Mohamed with him) (Teh Poh Teik & Co) for the appellant.*
Yusaini Amer bin Abd Karim (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

F **Hamid Sultan JCA (delivering judgment of the court):**

[1] The appellant/accused's appeal came up for hearing on 28 February 2013 and upon hearing we allowed the appeal on the same day. My learned brothers G Mohamed Apandi bin Hj Ali JCA and Linton Albert JCA have read the draft judgment and had approved the same. This is our judgment.

THE BRIEF FACTS

H **[2]** The appellant was charged for trafficking 646.1g 3, 4–Methylenedioxymethamphetamine under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA 1952'). At the end of the prosecution case the court ruled it was a case of possession only and in consequence reduced the charge to be punishable under s 39A(2) of the DDA 1952. The appellant pleaded guilty I and was sentenced to nine years imprisonment and ten strokes of the *rotan*. The prosecution was dissatisfied and appealed and the Court of Appeal ordered the defence to be called on the original charge of trafficking. The learned trial judge who had convicted him for possession heard the defence case and held that the offence of trafficking had been proven and accordingly sentenced him to death.

[3] It must be noted that (a) the solicitor who acted at the prosecution stage was one and at defence stage another, (b) the learned judge at the end of defence case took into consideration the appellant's plea of guilt for possession previously, inter alia, to reject his defence and concluded as an afterthought.

THE PROSECUTION AND DEFENCE VERSION

[4] The prosecution version can be summarised as follows:

(a) the appellant was arrested along a five foot way to a shop;

(b) he was holding a plastic bag in his right hand;

(c) the appellant attempted to flee and put up a struggle; and

(d) the plastic bag contained drugs which is the subject matter of the charge.

[5] The appellant's version can be summarised as follows:

(a) he went to collect a gaming debt from Simon in a car;

(b) as he was walking to meet Simon he was arrested;

(c) the police recovered the bag from the boot of the car; and

(d) the car belongs to his girl friend, 'Nicole'.

[6] It must be noted that upon the Court of Appeal ordering the defence to be called counsel for the appellant made an application to recall the prosecution's main witness SP1 for further cross-examination to put the defence case, (inter alia, ownership of the car) which was omitted by the previous counsel. The application was refused by the learned judge. In addition the learned judge in the grounds of judgment, inter alia, stated as follows:

(a) the defence was an afterthought;

(b) failure to call 'Nicole' could attract adverse inference; and

(c) took into account the plea of guilt of the accused in the prosecution stage and that part of the judgment reads as follows:

> The defence version of not carrying the bag is accordingly rejected as to my mind the version has not caused any reasonable doubt as to the truth of the prosecution's case.
>
> The other telling facet of the case is that his version is in complete variance to the stand taken by him earlier in pleading guilty to the amended charge in that he was in custody and control of the offending drugs.
>
> He conveniently now tries to shift the blame to his previous lawyer for failing to put the afterthought defence to PW1.

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The accused's manoeuvre to recall the arresting officer for further cross-examination under s 425 of the CPC is made too late in the day and to my mind an attempt to bolster the afterthought defence and was accordingly refused by me.

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The evidence of Simon (DW2) does not in the slightest degree create a doubt in my mind nor affect the core of the truthfulness of the prosecution's case. Simon (DW2) is to my mind an interested witness but nevertheless I have cautioned myself that his testimony ought not to be rejected outright and have accordingly observed his demeanor which leads me to conclude that Simon (DW2) is an untruthful witness when he stated that the accused was

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not carrying anything and he did see the police taking out the bag from the boot of the car.

In conclusion it is my finding that the accused has failed to create any reasonable doubt to the prosecution's case nor has the accused rebutted the presumption of trafficking on a balance of probabilities. The prosecution has

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discharged its burden of proving its case beyond reasonable doubt.

The accused is accordingly convicted for the offence of trafficking as charged and is hereby condemned to the sentence of death by hanging from the neck.

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THE APPELLANT'S COMPLAINT

[7] The appellant's complaint can be summarised as follows:

(a) wrong to refuse defence application to recall the investigating officer

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('SP1') pursuant to s 425 of the CPC;

(b) plainly wrong and/or perverse to have considered the earlier appellant's plea of guilt at the prosecution stage; and

(c) proper consideration was not given to the defence case, and wrong

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application of adverse inference.

[8] On the factual matrix of the case we take the view that it was plainly wrong for the learned trial judge without good reasons to arbitrarily disallow the appellant's application to recall SP1 to put the defence version that too

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knowing that the Court of Appeal had directed the defence to be called for trafficking which carries the penalty of death. Our reasons, inter alia, are as follows:

(a) it is well settled that court has a wide discretion to allow a witness to be

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called or recalled not only under s 425 but many other provisions of the law before the close of defence case. The threshold requirement for calling or recalling is that it *just needs to appear* (low threshold) it is essential to the just decision of the case. (Emphasis added.) Section 425 of the CPC reads as follows:

> Any Court may at any stage of any inquiry, trial or other proceeding under this Code summon any person as a witness or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person in his evidence appears to it essential to the just decision of the case.

(b) it will be a useful guide to reproduce a commentary passage to the above section by the learned author, Hamid Sultan bin Abu Backer, in the book titled *Janab's Key To Criminal Procedure of Evidence*, (2nd Ed), 2010 pp 577–578 which read as follows:

> This section gives wide power to the court at any stage of inquiry, trial or other proceeding to summon, examine, re-examine person in attendance or those who have given evidence if their evidence is essential to just decision of the case. It is appropriate to read this section with section 162 of the code and section 138(4) of the Evidence Act which are similar in nature. Further, there are other provisions in the code to recall witness [see ss. 162 and 173 of the code].

(c) s 425 of the CPC applies to the prosecution as well as the defence. The court has in almost all cases allowed the prosecution or the defence to call or recall the witness. In *Loke Poh Siang v Public Prosecutor* [1957] 1 MLJ 107 it was stated that the court has an absolute discretion in recalling or calling a witness after the close of the prosecution case to rectify an omission in the prosecution evidence (see *Ramli bin Kechik v Public Prosecutor* [1986] 2 MLJ 33). The only caveat is that after defence has been closed no further evidence ought to be allowed unless the cause for such evidence is one which no human ingenuity could have foreseen. In *Yap Fook Yew and another v Public Prosecutor* [1949] supp MLJ 3, the court had this to say:

> It has been laid down by the court of Criminal Appeal in England that after the defence has been closed no further evidence should be called either by the court or by either party unless the cause for such evidence is one which no human ingenuity could have foreseen.

Although we accept the arguments of the learned deputy public prosecutor that the power under s 425 is discretionary we must say it cannot be exercised arbitrarily but must be exercised judiciously failing which appellate interference may be warranted (see *Public Prosecutor v Phon Nam* [1988] 3 MLJ 415 (SC)).

[9] In the instant case not only has the learned judge refused to exercise his discretion judiciously to allow the defence to conduct his case according to law but also went on to say that the defence was an afterthought and failure to call 'Nicole' will attract adverse inference. In our view the refusal of the learned

judge to allow the witness to be recalled and subsequently making adverse findings and remarks in respect of the defence case compromises the integrity of the decision making process and attracts the jurisprudence relating to mistrial as well as miscarriage of justice, which requires appellate intervention to rule that the conviction is not safe. In *Public Prosecutor v Abdul Rahim bin Satar* [1990] 3 MLJ 188 was Wan Yahya J (as he then was) had this to say:

> The role of a judge in our adversarial system of justice has often been misunderstood. Although depicted symbolically as a blindfolded lady balancing the scales of justice, a judge should not be completely oblivious to the surround events at the trial affecting his assessment of a case. It is true that he must not load onto any side of the scales extrinsic evidence but he certainly owes a duty to take onto the scales formal evidence which, although available and alluded to, was inadvertently left out by either party.

[10] We are of the considered view that it is not proper for the learned judge on the factual matrix of the case to invoke adverse inference pursuant to s 114(g) of the Evidence Act 1950 ('EA 1950') against the defence for not calling 'Nicole'. The learned judge had taken great pains to analyse the jurisprudence relating to adverse inference against the accused in reliance of an article by a reputed author on adjectival law. The said article also dealt with the case of *Choo Chang Teik & Anor v Public Prosecutor* [1991] 3 MLJ 423 where the Supreme Court disagreed to the proposition that adverse inference cannot be made at all against the accused and went on to provide a small window for that jurisprudence to sip through in limited circumstances. Indian cases also support the proposition that in limited circumstances adverse inference can be invoked against the accused with a caveat that it should be done with caution. A passage from learned authors of *Nandi Criminal Ready Referencer* Vol 2 p 1748 will stand as a useful guide in respect of this issue in India. And that paragraph reads as follows:

> Against accused: In criminal cases court should not rely much on presumption under sec. 114, illustration (g) in view of the power conferred under sec 311 (old sec 540), Cr. P.C. — *Ram Jeet v State* AIR 1958 All 439; [1958] Cr LJ 716.
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> Court cannot compel an accused to produce a document which tends to incriminate him — State of *Gujarat v Shyamlal* AIR 1965 SC 1251; [1965] 2 Cr LJ 256; *M.P. Sharma v Satish Chandra* AIR 1954 SC 300; *State of Bombay v Kathikalu* AIR 1961 SC 1808. If defence fails to adduce evidence to prove his plea (alibi, private defence, insanity etc.) adverse inference can be drawn — *Sheo Dina v Emperor* AIR 1933 All 939; 35 Cr LJ 464; *Satya Vir v State* AIR 1958 Cr LJ 1266. In a murder charge the accused falsely denied several relevant facts established conclusively. Adverse inference can be drawn against the accused — *Pershadi v U.P. State* AIR 1957 SC 211; [1957] Cr LJ 328. Failure to render satisfactory account is a circumstance against the accused — *Bindeshwari Prasad v Emperor* AIR 1949 Pat 69; 50 Cr LJ 108. Accused is charged of rape and causing death of victim. Failure of accused to

explain the presence of dead body of victim on a cot inside the house of the accused is an incriminating circumstance — *State v Gangula* [1996] Cr LJ 774 (SC).

[11] The learned judge's conclusion on this issue is found at pp 59–60 of the record of appeal, and it reads as follows:

> In the light of the analysis aforesaid the principle deducible is that no adverse inference against an accused may be drawn by reason of his failure to call any witness for all he has to do is to raise a reasonable doubt. However, the failure to call any particular witness is a matter which the Court may take into account in assessing the weight of evidence (without drawing any adverse inference) especially so when the potential witnesses were persons in respect of whom the prosecution had probably no means of knowing that they might have any relevant evidence to give until the accused himself came to give evidence.
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> In the context of the factual matrix the existence of Nicole and her connection with the car came to light only when the accused gave evidence. Applying the principle as deduced above no adverse inference is drawn against the accused. However, the failure to call Nicole is a factor which Court is not preluded from taking into consideration in assessing the weight of the accused's denial of ever having seeing the plastic bag.

[12] On the above issue, we must say that as early as the year 1999 ie before the decision in the case of *Choo Chang Teik*, the Supreme Court in *Illian & Anor v Public Prosecutor* [1988] 1 MLJ 421 had in immutable terms advocated that s 114(g) of the EA 1950 cannot be invoked against an accused person nor can the failure of the accused to call any witness be made the subject of comment at a criminal trial. And Wan Suleiman SCJ had this to say:

> The application by the learned deputy to call an immigration officer under s 425 of the Criminal Procedure Code to give evidence to rebut the evidence was refused, according to the learned trial judge, in order to maintain his impartiality, yet His Lordship chose to remark (at p 164) that 'it is incumbent upon the defence to call this witness, let alone object to the calling of the witnesses', referring to the defence's objection of the calling of the immigration officer on the question of authenticity of the Border Pass, despite those authorities which make it more than abundantly clear that s 114(g) of the EA cannot be invoked against an accused person or for that matter failure to call any witnesses made the subject of comment to the jury at a jury trial.

[13] It must be noted that the Supreme Court in *Illian*'s case had relied on the Court of Appeal decision in *Goh Ah Yew v Public Prosecutor* [1949] 1 MLJ 150 where it was stated:

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> No inference can be drawn against an accused person in a criminal trial. There is no duty upon an accused person to call any evidence. He is at liberty to offer evidence or not as he thinks proper and no inference unfavourable to him can be drawn because he adopts one course rather than the other.

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[14] Such proposition of the law has also been dealt at length by my learned brother Justice Mohamed Apandi Hj Ali in *Tay Kok Wah v Public Prosecutor* [2012] 4 MLJ 502. The said proposition has been elevated to the status of law that is to say that the accused is exempt from s 114(g) of the EA 1950. And that proposition cannot be whittled by the apex court in subsequent judgment and if necessary can only be done by Parliament because of the special protection entrenched in the Federal Constitution for the accused. Article 5(1) says:

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> No person shall be deprived of his life or personal liberty save in accordance with law.

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[15] In *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507 the Federal Court has rightly asserted that any departure from the entrenched judicial interpretation laid down in the long line of decisions should be left to the Legislature. The only caveat to this principle will be that such interpretation should not infringe any provision of the Federal Constitution. An interpretation which is in conflict with the Federal Constitution is a nullity ab initio, and such an interpretation will not tie the hands of the Court to administer justice, (see *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1).

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[16] The protection in art 5(1) which is supreme in nature is not afforded to the prosecution or plaintiffs or defendants in civil cases. The difference is like apple and orange and one should not read s 114(g) in a literal sense when it relates to the accused without considering not only the Federal Constitution but the criminal jurisprudence in common law jurisdiction which bend backwards to lean in favour of the accused as far as the justice of the case will allow (see *Woolmington v Deputy Public Prosecutor* [1935] AC 462). The only caveat is that it is for the court to balance public interest as well as to ensure justice is not compromised to the detriment of the victim. In *Shahabuddin and another v State of Assam* Cr A No 629 of 2010, the Supreme Court of India had this to say:

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> Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the judge. During the course

of the trial, the learned President Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not subserved. For truly attaining this object of a 'fair trial', the court should leave no stone unturned to do justice and protect the interests of the society as well.

[17] We also saw another flaw in the learned judge's judgment. The court arbitrarily invoked s 114(g). Before invoking s 114(g) for any matter the court must be satisfied that the evidence was in existence and could be produced, (see *Mahabir Singh v Rohini* (1933) 35 BOMLR 500). In the instant case we were not able to find any adumbration on this issue by the learned judge which stands as a *sine qua non* in order to draw adverse presumption and/or inference. It must not be forgotten that as a general rule no adverse inference can be drawn if there is failure to obtain evidence. Adverse inference can only be drawn if evidence is withheld unless the law says otherwise, (see *Jammu & Kashmir Bank Ltd v Attar-ul-Nissa & Others* AIR 1967 SC 540).

[18] In the instant case the witness 'Nicole' is also a potential witness to the prosecution at least for the purpose of satisfying the maximum evaluation test. In such circumstances it was plainly wrong and perverse for the learned judge to rely on s 114(g).

[19] The duty of the court at the end of the defence case in applying the jurisprudence relating to maximum evaluation and beyond reasonable doubt test is to consider whether the defence evidence tested with the totality of the evidence warrants an acquittal or conviction for the original charge or reduced charge as the case may be (see *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281). The court must refrain from making adverse comments on the shoddiness of the defence case, and apply (*Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169) *Radhi's* direction with religious precision (see *Tong Kam Yew & Anor v Public Prosecutor* [2013] 4 MLJ 888).

[20] We are also of the considered view that it was plainly wrong and/or perverse for the court to consider the earlier plea of guilt by the appellant to a reduced charge at the prosecution stage. Such a consideration which is irrelevant in criminal jurisprudence in the instant case has caused a mistrial and/or miscarriage of justice as it clouded the court from acting fairly and reasonably without bias whatsoever in assessing the defence version. It must not be forgotten the requirement of impartiality is a principle of natural justice and a patent breach as in the instant case will compromise any decision making process.

[21] In conclusion taking into consideration all the issues which the

A appellant has complained we take the view it is not safe to convict the accused, (see *Thenegaran a/l Murugan & Anor v Public Prosecutor* [2013] 2 MLJ 855). In consequence the appeal is allowed, the conviction and sentence by the High Court is set aside and the appellant is accordingly acquitted and discharged.

B **[22]** We hereby order so.

Appeal allowed.

C Reported by Kohila Nesan

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